



Ayoro & another v Otina & 6 others (Environment and Land Appeal E057 of 2021) [2023] KEELC 18403 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E057 OF 2021
SO OKONG'O, J
JUNE 29, 2023**

BETWEEN

ESTATE OF CHRISTINE AYORO 1ST APPELLANT

GEORGE OMONDI AYORO 2ND APPELLANT

AND

JOHN ONYANGO OTINA 1ST RESPONDENT

PETER ODUOR OTINA 2ND RESPONDENT

DANIEL OCHIENG OTINA 3RD RESPONDENT

GEORGE OMONDI OTINA 4TH RESPONDENT

THE DISTRICT LAND REGISTRAR-KISUMU 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

THE LAND ADJUDICATION OFFICER-NYANDO 7TH RESPONDENT

(Being an appeal from the judgment and decree of Hon. R.S. Kipng'eno PM delivered on 29th June 2021 in Nyando SPMC ELC No. 29 of 2018)

JUDGMENT

Brief facts

1 The 1st to 4th Respondents filed a suit against the Appellants and the 5th, 6th and 7th Respondents in the High Court of Kenya at Kisumu through a plaint dated 17th July 2009 namely, Kisumu HCCC No. 125 of 2009. The 1st to 4th Respondents amended their plaint on 2nd July 2010. The suit was subsequently transferred to Nyando Resident Magistrate's Court in 2018 and assigned a new case number; Nyando SPMC ELC No. 29 of 2018. In their amended plaint, the 1st to 4th Respondents



- sought; a declaration that Title No. Kisumu/Muhoroni/1080 (hereinafter referred to as “Plot No. 1080”) was acquired by the Appellants fraudulently, an order cancelling the said title, and the costs of the suit together with interest.
- 2 The 1st to 4th Respondents averred that they were the administrators of the estate of Paul Otina Onyango deceased (hereinafter referred to only as “the deceased”). The 1st to 4th Respondents averred that the deceased was at all material times the owner of a parcel of land known as Kisumu/Muhoroni/064-90/490 (hereinafter referred to as “Plot No. 490”). The 1st to 4th Respondents averred that the deceased subdivided Plot No. 490 which subdivision gave rise to Title No. Kisumu/Muhoroni/1080 (Plot No. 1080) and Title No. Kisumu/Muhoroni/1081(hereinafter referred to as “Plot No.1081”). The 1st to 4th Respondents averred that the deceased retained Plot No. 1080 in his name and transferred Plot No. 1081 to one, Walter Hombe.
 - 3 The 1st to 4th Respondents averred that on 17th December 2008, they were surprised upon carrying out a search on Plot No. 1080 to learn that the Appellants had gone to the Lands Office and fraudulently obtained a title for Plot No. 1080 without their consent. The 1st to 4th Respondents averred that upon this discovery, they placed a restriction on the title. The 1st to 4th Respondents pleaded several particulars of fraud against the Appellants and the 5th, 6th and 7th Respondents. The 1st to 4th Respondents contended that the Appellants and the 5th, 6th and 7th Respondents conspired to change the ownership of Plot No. 1080 from the name of the deceased to that of the Appellants without the consent of the family of the deceased. The 1st to 4th Respondents averred further that the Appellants acquired the suit property before letters of administration in respect of the estate of the deceased had been issued and confirmed. The 1st to 4th Respondents contended that the Appellants and the 5th, 6th and 7th Respondents fraudulently rectified the register of Plot No. 1080 without verifying the ownership of the property.
 - 4 The 2nd Appellant filed a statement of defence on 8th February 2010. The 2nd Appellant averred that Christine Ayoro was deceased and as such her estate was incapable of being sued since the estate had no legal personality. The 2nd Appellant denied that the deceased was the owner of Plot No. 490 and that he subdivided the same to give rise to Plot No. 1080 and Plot No. 1081. The 2nd Appellant averred that Plot No. 490 was subdivided when it was discovered that the new Plot No. 490 was erroneous as it comprised of pieces of land that belonged to the deceased, and the late Elly Ayoro in respect of whose estate he was the legal representative.
 - 5 The 2nd Appellant averred that upon subdivision of Plot No. 490 to create Plot No. 1080 and Plot No. 1081, Plot No. 1080 was registered in the name of Elly Ayoro while Plot No. 1081 was registered in the name of the deceased. The 2nd Appellant averred that this development came about following the realignment of Plot No. 489 and Plot No.490 after the construction of Muhoroni-Chemelil Road. The 2nd Appellant denied that he acquired the suit property fraudulently. The 2nd Appellant denied all the particulars of fraud enumerated in the plaint and urged the court to dismiss the 1st to 4th Respondents’ suit with costs.
 - 6 The 2nd Appellant did not amend his defence following the amendment of the plaint by the 1st to 4th Respondents. The 5th and 6th Respondents filed a joint statement of defence on 22nd September 2009 in which they denied all the allegations contained in the plaint and put the 1st to 4th Respondents to strict proof of the same.
 - 7 In a judgment delivered on 29th June 2021 after hearing the parties, the lower court entered judgment for the 1st to 4th Respondents against the Appellants. The lower court declared that the Appellants had acquired the suit property fraudulently and ordered the title held by the Appellants in respect of



the property cancelled. The lower court found that the transfer of the suit property from the name of the deceased to that of the Appellants after the death of the deceased without a Grant of Letters of Administration in respect of the estate of the deceased having been obtained was irregular. The lower court ordered each party to bear its own costs.

DIVISION - The appeal

8 The Appellants were aggrieved by the said judgment and filed the present appeal. In their Memorandum of Appeal dated 28th July 2021, the Appellants challenged the lower court judgment on the following grounds;

1. That the Learned Trial Magistrate erred in fact and in law in finding and thereby holding that the transfer of Plot No. 1080 to the Appellants was irregular notwithstanding the Appellants' having produced a clean title in respect thereof.
2. That the Learned Trial Magistrate erred in fact and in law in ordering the cancellation of the title to Plot No. 1080 held by the Appellants while the Appellants had been in actual and uninterrupted occupation thereof for a period of over 12 years (since 1963).
3. That the Learned Trial Magistrate erred in fact and in law in failing to direct his mind properly on the law and principles governing the transfer of property rights and as a result arrived at a wrong decision in law.
4. That the Learned Trial Magistrate erred in fact and in law in ordering the cancellation of the title to Plot No. 1080 held by the Appellants even after he had observed the mismanagement of the title records.
5. That the Learned Trial Magistrate erred in fact and in law in failing to sufficiently take into account all the evidence presented before him in totality and in particular the oral and documentary evidence tendered by the Appellants.
6. That in ordering the cancellation of the title to Plot No. 1080 held by the Appellants, the Learned Trial Magistrate was not guided by the law but by other extraneous factors.

9 The Appellants prayed that the appeal be allowed, and the judgment of the lower court delivered on 29th June 2021 be set aside and substituted with an order dismissing the lower court suit. The Appellants also prayed for the costs of the lower court suit and of the appeal.

The cross-appeal

10 The 1st to 4th Respondents filed a cross-appeal dated 21st December 2022 against the lower court's decision on the issue of costs. The 1st to 4th Respondents urged the court to vary and/or reverse the lower court order on costs on the following grounds;

1. That the Learned Trial Magistrate erred in law and in fact in his holding that the Appellants acted innocently and in good faith after finding that the Appellants had irregularly transferred the Respondents' land to their names.
2. That the Learned Trial Magistrate erred in law and in fact for failing to find that the 1st to 4th Respondents were entitled to cost since costs follow the event and the 1st to 4th Respondents were the successful parties.
3. The Learned Trial Magistrate erred in law and in fact by failing to award costs even when he had found that the Appellants had acted irregularly.



- 11 The 1st to 4th Respondents prayed that the Appeal be dismissed for lack of merit and that the costs in the lower court and before this court be awarded to the 1st to 4th Respondents.

The submissions

The Appellants' submissions

- 12 The Appellants filed their submissions on 20th January 2023. The Appellants submitted that the 1st to 4th Respondents had not proved their case on a balance of probabilities to warrant the judgment that was entered in their favour by the lower court. The Appellants submitted that having found that the Appellants had not engaged in any fraudulent conduct in the transfer of Plot No. 1080 to their names, the lower court had no basis for making an order that the Appellant's title to the property be cancelled. The Appellants submitted that there was no evidence before the lower court in support of its finding that the transfer of Plot No. 1080 to the Appellants was carried out irregularly. The Appellants submitted that the 1st to 4th Respondents failed to prove their case against the Appellants to the required standard and as such the lower court erred in entering judgment in their favour. The Appellants submitted that the burden was on the 1st to 4th Respondents to prove their case and that the lower court erred in shifting the burden of proof from the 1st to 4th Respondents to the Appellants.
- 13 The Appellants cited the decision in Chuka ELC Case No. E002 of 2020, Eviline Karigu (Suing as the Administratrix of the Estate of the late Muriungi M'chuka alias Miriungu M'Gichuga v. M'Chabari Kinoro [2020] eKLR in support of their submissions.
- 14 With regard to the 1st to 4th Respondents' cross-appeal, the Appellants reiterated that the 1st to 4th Respondents did not prove their case against the Appellants to the required standard. The Appellants submitted that as a general rule costs follow the event and that the same is at the discretion of the court. The Appellants submitted that the court should not interfere with the lower court's exercise of discretionary power. The Appellants urged the court to allow their appeal.
- 15 The 1st, 2nd, 3rd and 4th Respondents' submissions
- 16 The 1st, 2nd, 3rd and 4th Respondents (hereinafter referred to only as "the Respondents" for ease of reference) filed their submissions on 28th February 2023. The Respondents submitted that they proved their case before the lower court on a balance of probabilities. In support of this submission, the Respondents relied on Re B [2008] UKHL 35, In Re H (Minors) [1956]AC 563 at 586, Secretary of State for the Home Department v. Rehman [2001]UKHL 47, Miller v. Minister of Pensions [1947] 2 All ER 372, Rhesa Shipping Co. v. Edmunds [1985] 1 WLR 958, Fosse Motor Engineers v. Conde Nast [2008] EWHC 2037 (TCC) and Ide v. ATB Sales [2008] EWCA Civ. 424.
- 17 The Respondents submitted that they had proved fraud on the part of the Appellants. In support of this submission, the Respondents cited the cases of Mohamed Fugicha v. Methodist Church in Kenya C.A No. 22 of 2015, R.G. Patel v. Lalji Makanji [1957] E.A 314, and Bullen & Leake & Jacobs, Precedent of Pleadings, 13th Edition at page 427.
- 18 On their cross-appeal, the Respondents submitted that they should be awarded the costs of the lower court suit and that of the appeal. The Respondents submitted that the award of costs is at the discretion of the court and that the general rule is that costs follow the event unless the court for good reason orders otherwise. The Respondents submitted that the discretionary power of the court on the issue of costs must be exercised judicially. In support of these submissions, the Respondents relied on the provisions of section 27 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya and the cases of Republic v. Rosemary Wairimu Munene, Ex parte Applicant v. Ihururu Dairy Farmers Co-operative Society



Limited, Judicial Review Application No. 6 of 2014 and Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & Others [2014] eKLR, Halsbury's Laws of England, 4th Edition(Re-Issue), [2010], Vol.10 paragraph 16, and Judicial Hints on Civil Procedure, 2nd Edition published by Law Africa at page 94. The Respondents submitted that since they were the successful parties in the lower court, they should have been awarded the costs of the suit.

Analysis and determination

- 19 I have considered the pleadings and proceedings of the lower court, the judgment of the court the subject of the appeal, the grounds of appeal and cross-appeal put forward by the Appellants and the 1st to 4th Respondents respectively, and the submissions by the parties. I will consider the appeal and thereafter the cross-appeal. The Appellants' six grounds of appeal raise three issues for determination by this court as follows; whether the lower court erred in its finding that the Appellants acquired Plot No. 1080 irregularly, whether the lower court erred in cancelling the title that was held by the Appellants in respect of Plot No. 1080 and restoring the ownership of the property to the 1st to 4th Respondents and finally, whether the Appellants' appeal should be allowed and the reliefs sought granted. I will determine all these issues together since they are connected.
- 20 This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v. Sunday Post Ltd. [1958] E.A 424 and Makube v. Nyamuro [1983] KLR 403.
- 21 I have carefully reviewed the evidence that was adduced by the parties in the lower court. I am unable to fault the lower court in its finding that the 1st to 4th Respondents had proved that the Appellants had acquired Plot No. 1080 irregularly. I am not in agreement with the submissions by the Appellants that the lower court shifted the burden of proof from the 1st to 4th Respondents to the Appellants. In Kurshed Begum Mirza v. Jackson Kaibunga [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

- “13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or



tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

22 Apart from the legal burden of proof, there is the evidential burden of proof which keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law...”

23 The 1st to 4th Respondents produced in evidence a copy of the title deed for Plot No. 490 issued on 3rd January 1995. The 1st to 4th Respondents also produced in evidence a copy of a certificate of official search in respect of Plot No. 490. The title deed and the search showed that Plot No. 490 was registered in the name of Paul Otina Onyango deceased (the deceased) on 3rd January 1995. The deceased was the second registered proprietor of Plot No. 490. The 1st to 4th Respondents also produced in evidence a copy of the extract of the register (Green Card) for Plot No. 1080. According to this extract, Plot No. 1080 was a subdivision of Plot No. 490, and the same was registered in the name of the deceased as the first registered owner thereof on 11th May 1992. There appears to be some inconsistency on the dates when the deceased was registered as the owner of Plot No. 490 and Plot No. 1080 which is said to have been a subdivision of Plot No. 490. It is not clear how the deceased was registered first as the owner of Plot No. 1080 before he was registered as the owner of Plot No. 490 which was subdivided to give rise to Plot No. 1080 and Plot No. 1081. It was however common ground that Plot No. 490 was registered in the name of the deceased. It was also common ground that the subdivision of Plot No. 490 gave rise to Plot No. 1080 and Plot No. 1081. The disagreement between the parties was on what became of Plot No. 1080 upon its creation from Plot No. 490.

24 The 1st to 4th Respondents contended that Plot No. 1080 was registered in the name of their deceased father, Paul Otina Onyango (the deceased) as the owner thereof. The Appellants on the other hand claimed that Plot No. 1080 was given to Elly Ayoro deceased and was subsequently registered in their names as the administrators of the estate of the said Elly Ayoro. The extract of the register for Plot



No. 1080 that was produced in evidence by the 1st to 4th Respondents shows that Paul Otina Onyango (the deceased) was the first registered owner of Plot No. 1080. The said extract also shows that the Appellants were registered as the owners of Plot No. 1080 on 24th September 2008 as the second registered owners of the property. A copy of the title deed for Plot No. 1080 which was produced in evidence by the Appellants also supports the fact that the Appellants were registered as the second registered owners of Plot No. 1080 on 24th September 2008. No evidence was placed before the court in proof of the fact that Plot No. 1080 was at any time registered in the name of Elly Ayoro deceased.

- 25 The 1st to 4th Respondents having proved that Plot No. 1080 was registered in the name of their deceased father, Paul Otina Onyango (the deceased) on 11th May 1992 and that the deceased died on 29th November 1998, the burden shifted to the Appellants to prove that their registration as the owners of Plot No. 1080 on 24th September 2008 about 10 years after the death of the deceased owner of the property was lawful. Since Paul Otina Onyango (the deceased) was the registered owner of Plot No. 1080, the Appellants who became registered owners of the property after the deceased could only acquire their interest in the property lawfully from the deceased or the 1st to 4th Respondents who were the administrators of the estate of the deceased.
- 26 The Appellants did not contest the fact that they did not acquire Plot No. 1080 from the deceased or the 1st to 4th Respondents. The Appellants' case was that they acquired Plot No. 1080 from the Settlement Fund Trustees. The Appellants produced in evidence an instrument of transfer with several alterations on it through which the said Settlement Fund Trustees purported to transfer Plot No. 1080 to the Appellants. As at 24th September 2008 when the purported transfer was registered, Plot No. 1080 was registered in the name of the deceased. It follows therefore that the Settlement Fund Trustees could not transfer to the Appellants land that was not registered in their name. The use of the purported instrument of transfer executed by the Settlement Fund Trustees to transfer Plot No. 1080 registered in the name of the deceased Paul Otina Onyango (the deceased) to the Appellants was not only irregular but also illegal and fraudulent. The said instrument of transfer could not have been registered and acted upon without some form of collusion between the Appellants and the 5th Respondent.
- 27 Due to the foregoing, it is my finding that the 1st to 4th Respondents established in the lower court that Plot No. 1080 was acquired by the Appellants irregularly and fraudulently. The lower court did not, therefore, err in its finding that the Appellants' title to Plot No. 1080 was acquired irregularly.
- 28 The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

“27. Subject to this Act -

- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held



by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

29 Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

30 Section 143(1) and (2) of the Registered *Land Act* provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

31 Section 24 and 25 of the *Land Registration Act*, 2012 provides as follows:

“24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

32 From the foregoing, it is clear that under the current land registration system and the land registration regime under which Plot No. 1080 was purportedly transferred and registered in the name of the Appellants, their title was indefeasible to the extent that it was not acquired illegally, unprocedurally or fraudulently. The Registered *Land Act* (now repealed) which is the statute under which Plot No. 1080 was registered provides that a register of land can be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.

33 The 1st to 4th Respondents having established that the Appellants acquired Plot No. 1080 illegally, unprocedurally, and fraudulently were entitled to an order for the rectification of the register for Plot No. 1080 by the cancellation of the registration of the Appellants as the proprietors of the Plot No. 1080 and return of the property to the name of the deceased. The lower court did not err in making the order. In view of the foregoing findings, I find no merit in the Appellants’ appeal.

34 With regard to the 1st to 4th Respondents’ cross-appeal, the 1st to 4th Respondents challenged the decision of the lower court only with regard to costs. The lower court for reasons given in the judgment ordered that each party bears its own costs of the lower court suit. In the text, *Judicial Hints On Civil Procedure*, 2nd Edition the author has stated as follows on costs at page 100:

“The Law on costs as it is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part- no omission or neglect, and no vexatious or oppressive conduct attributable to him which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff’s right to cost. If the defendant however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.

35 In *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR, the court stated as follows:

“As for costs, it was correctly submitted by the respondent that the discretion of the court to grant or withhold costs is enshrined in section 27 of the *Civil Procedure Act*. It provides inter alia as follows:

36 Sec.27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

37 Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
- 38 In the Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, the High Court had this to say on the issue of costs:-
- “It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”
- 39 From the foregoing authorities, the award of costs was at the discretion of the lower court. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:
- “It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
- 40 In *Mbogo v. Shah* [1968] E. A. 93 the court stated as follows at page 94:
- “I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
- 41 I am not persuaded that the lower court failed to exercise its discretion properly. The judgment of the lower court in my view was very well written. The lower court had a very good grasp and understanding of the case that was before it. It considered in detail the history of the dispute and several attempts that were made unsuccessfully to resolve the same. It appreciated that the parties were let down by Government officials who failed to deal decisively and with finality with the challenges that were occasioned to land owners by the re-planning of several parcels of land that was caused by the construction of Chemelil-Muhoroni Road. The lower court was of the view upon perusing the conflicting correspondence from the various Land Adjudication and Settlement Officers who made proposals on how to resolve the dispute that the Appellant’s father lost some land during the said re-planning exercise and that they may have been acting in good faith although irregularly when they had Plot No. 1080 transferred to their names on the advice of some of the said Land Adjudication and Settlement Officers. It was as a result of the foregoing that the lower court ordered each party to bear its own costs. The decision of the lower court on the issue was in the circumstances well considered. I am not persuaded that the court took into account irrelevant matters or that it failed to consider any relevant matter. I find no reason why I should interfere with the lower court’s exercise of discretion in the circumstances. Due to the foregoing, I find no merit in the cross-appeal.



Conclusion

42 In the final analysis and for the foregoing reasons, the following are my final orders in the appeal;

1. The appeal by the Appellants is dismissed.
2. The cross-appeal by the 1st to 4th Respondents is dismissed.
3. The 1st to 4th Respondents shall have half (½) the costs of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 29TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellants

Mr. Mwamu for the 1st to 4th Respondents

N/A for the 5th, 6th and 7th Respondents

Ms. J. Omondi-Court Assistant

